

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	
)	
NPCR, Inc. d/b/a Nextel Partners)	CC Docket No. 96-45
)	
Supplement to Petition for Designation as an)	
Eligible Telecommunications Carrier in the)	
State of New York)	

**COMMENTS OF
THE NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC.**

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On April 12, 2004, the Federal Communications Commission (“FCC” or “Commission”) released for comment the Supplement to Petition (“Supplement”) for Eligible Telecommunications Carrier (“ETC”) status by Nextel Partners (“Nextel”) for the State of New York.¹ Nextel had filed its original Petition with the FCC on April 3, 2003 and its Supplement to Petition on March 24, 2004,² stating that it satisfies all of the statutory and regulatory prerequisites for ETC designation in New York State, including the designation framework detailed in the recently approved *Virginia Cellular Order*.³

¹ *Parties are Invited to Comment on Supplemented Petitions for Eligible Telecommunications Carrier Designations*, CC Docket No. 96-45, Public Notice, DA 04-998 (released April 12, 2004). The Notice regarding the request for comment appeared in the *Federal Register* on April 23, 2004, 69 Fed. Reg. 22031 (2004). The Notice also included similarly filed supplemental petitions by Nextel and other wireless carriers in various states. All of Nextel’s supplemental petitions associated with the Public Notice were identical, save for an exhibit referencing construction budget plans.

² *Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Supplement to Petition for ETC Designation in the State of New York*, CC Docket No. 96-45 (filed March 24, 2004). (“*Nextel Supplement*”)

³ *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (released January 22, 2004). (“*Virginia Cellular Order*”)

SUMMARY

The New York State Telecommunications Association, Inc. (“NYSTA”) hereby reiterates our opposition to the grant of Nextel’s request.⁴ Nextel’s Supplement does not meet the requirements of ETC designation, including those enumerated in the *Virginia Cellular Order*. Specifically, in addition to the arguments raised in our Comments on Nextel’s initial Petition,⁵ the Supplement does not sufficiently explain how Nextel satisfies the *Virginia Cellular Order*’s criteria, including that it will provide the supported services throughout its entire Designated Areas within a reasonable time period, increase competitive choice, strive to avoid cream skimming, and commit to provide high quality telephone service. Accordingly, Nextel’s request for ETC designation for New York State should be denied in all respects. In the alternative, Nextel’s Supplement should be denied in all rural study areas for the reasons discussed below.

STATEMENT OF INTEREST

NYSTA is a non-profit association incorporated in 1921 whose membership includes all of the incumbent local exchange carriers operating in New York State as well as several competitive local exchange carriers, interexchange carriers, and Internet service providers. The incumbent local exchange carrier members of NYSTA (“ILECs”) have all been certified as ETCs and were providing ubiquitous service prior to designation. Nextel has sought ETC designation in all but four of the study areas of these

⁴ The member companies of NYSTA concurring in this filing appears as Attachment I.

⁵ *In the Matter of Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners, Petition for Designation as an Eligible Telecommunications Carrier in the State of New York*, Comments of the New York State Telecommunications Association, Inc., CC Docket No. 96-45, DA 03-2329, filed August 18, 2003. (“NYSTA Comments”)

certificated service providers and, accordingly, our member LECs are directly affected by Nextel's Petition.

PARAMETERS OF THE ISSUE

Nextel is a licensed Commercial Mobile Radio Service provider throughout New York State. However, in order to be designated as an ETC, a carrier must demonstrate that it meets the requirements of Section 54.101(a) of the Commission's Rules⁶ and the criteria established in the *Virginia Cellular Order*.

On April 3, 2003, Nextel submitted its original Petition seeking ETC status in all but four study areas of New York.⁷ While Nextel selected the remaining 38 rural study areas as its Designated Areas, it does not provide service in many of them. In NYSTA's Comments responding to Nextel's original Petition, we addressed in detail how Nextel failed to meet the requirements of the Commission's Rules regarding ETC designation. NYSTA had argued that grant of Nextel's Petition would not enhance the availability of Universal Service in New York, would not promote competition in the state's rural areas, would result in federal Universal Service Fund ("USF") monies being used to support non-basic services, and would impair the continued viability of the Federal USF. Generally, NYSTA argued that Nextel's service is not available in so many of the study

⁶ See also 47 CFR 54.201(d) and 47 CFR 54.405. The specifics of these requirements and Nextel's failure to meet them were discussed at length in the August 18, 2003 NYSTA Comments.

⁷ NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of New York (filed April 3, 2003). See also: NPCR, Inc. d/b/a Nextel Partners Erratum to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York (filed April 9, 2003) which clarifies that Verizon and Frontier Telephone of Rochester are non-rural LECs and breaks out the Verizon wire centers served by Nextel Partners. ("Nextel Petition"). These study areas where ETC designation was not sought are ALLTEL-Jamestown, Fishers Island Telephone Corporation, Frontier Communications of New York, and Nicholville Telephone Company.

areas included in its Designated Areas that use of the USF could not possibly change this result. The Comments went on to recognize that ETC eligibility issues needed to be clarified and, as an alternative to dismissing the Petition, NYSTA argued that it should be held in abeyance pending the resolution of ETC eligibility issues by the FCC.

Then, on January 22, 2004, the FCC issued its *Virginia Cellular Order* which not only addressed whether Virginia Cellular had met the requirements to be an ETC in the Commonwealth of Virginia, it laid out specific criteria which the Commission would apply to all other ETC requests for rural areas.⁸

The Commission determined that “the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.”⁹ As a result, the *Virginia Cellular Order* established the following public interest criteria for consideration of a ETC request in rural areas:

- (1) The benefits of increased competitive choice
- (2) The impact of multiple designations on the Universal Service Fund
- (3) The unique advantages and disadvantages of the competitor’s service offering
- (4) Any commitments made regarding quality of telephone service, and
- (5) The competitive ETC’s ability to provide the supported services throughout the designated service area within a reasonable time frame¹⁰

⁸ *Virginia Cellular Order* at p. 3.

⁹ *Id.*

¹⁰ *Id.*, at pp. 13-14.

In addition, the *Order* also imposed “as ongoing conditions the commitments Virginia Cellular has made on the record in this proceeding.”¹¹ Virginia Cellular voluntarily agreed to the following:

- (1) To provide service where customers lack wireline access
- (2) To provide a mobility benefit, which is especially helpful in rural areas where people drive significant distances
- (3) To provide a larger local calling area than the incumbents, with less toll charges
- (4) To use USF monies to build more facilities and improve coverage
- (5) To comply with CTIA’s Consumer Code for Wireless Service
- (6) To annually provide the FCC with a list of complaints per 1,000 handsets
- (7) If not serving the entire area of a rural telephone company’s territory, will commit to provide Universal Service throughout its entire licensed area to avoid cream skimming¹²

As a result of the *Virginia Cellular Order*, all carriers seeking ETC status in rural areas must now comply with all of these additional requirements as well as the more generic language in the FCC Rules. Examination of Nextel’s Supplement indicates that the company has not remedied the infirmities in its original Petition and has not satisfied the *Virginia Cellular* criteria, rendering it insufficient for approval. Accordingly, Nextel has not demonstrated its qualifications to be an ETC in any study area of New York State.

ARGUMENTS

In its original Petition, Nextel identified all but four of the state’s study areas to be included in its Designated Areas, the vast majority of which are deemed rural areas served by Independent local exchange carriers. However, according to the service

¹¹ *Id.*, at p. 3.

¹² *Id.*, at pp. 14-15.

availability map on Nextel's web page, it currently provides service primarily along the state's major highways and in larger metropolitan areas.¹³ Further, its proposed 2004 construction budget (included as Exhibit 2 in Nextel's Supplement) reveals plans for improvements and/or new construction at 29 sites, but all but two are in non-rural study areas (and one of these was not included in Nextel's Designated Areas).¹⁴ To the best of NYSTA's knowledge, this construction will fill gaps in existing service but will not create coverage in the vast rural portions of Nextel's Designated Areas.

Nextel is apparently striving to improve its service coverage in the most populated areas of the state, while residents in several of the study areas will still not be able to receive Nextel's service. Further, as demonstrated in our Comments on Nextel's Petition, 96 percent of New Yorkers receive local telephone service, exceeding the national average of 95.3 percent.¹⁵ As a result, while most rural portions of Nextel's Designated Areas will not see increased competition (a necessary component of the *Virginia Cellular Order*), universal availability of local service will also not be affected due to the existing ubiquitous landline coverage. Further, by not serving many of the rural study areas, the "mobility benefit" referenced in the *Virginia Cellular Order* can not be credited to Nextel.

¹³ See: <http://www.nextel.com/cgi-bin/localMarketMap.cgi?market=mkt49>.

¹⁴ *Nextel Supplement* at Exhibit 2.

¹⁵ *FCC Report "Trends in Telephone Service,"* Industry Analysis and Technology Division, Wireline Competition Bureau, August 2003. These figures have been adjusted by the FCC in May 2004 to 95.2 percent for New York State and 95.1 percent nationwide.

Accordingly, Nextel's Supplement is deficient in meeting the competitive choices criteria from the *Virginia Cellular Order* and the company will not be providing service to unserved areas. It will not be offering service in many of its Designated Areas and will merely be expanding service where it already has a significant presence.

In addition, the only carriers in New York State which receive High Cost Support are the rural Independents. Those carriers serving non-rural study areas within Nextel's Designated Areas, including Verizon-New York and Frontier Telephone of Rochester, do not receive High Cost Support and their study areas, according to Nextel's service map, are where Nextel provides the vast majority of its service.

In the construction budget included with the Supplement, Nextel identifies only one rural study area where it will be improving service -- Cassadaga (served by Cassadaga Telephone Corporation) -- and a pair of rural exchanges (Walden and Corinth) in two very large study areas served by Frontier Communications of New York and Citizens Communications, respectfully. However, in 2003, Cassadaga Telephone received a little over \$200,000 in High Cost Support while Frontier Communications of New York, which received no High Cost Support in 2003, was not even included in Nextel's Designated Areas. Further, the \$732,000 in annual High Cost Support estimated by Nextel¹⁶ exceeds that received by 17 Independents and/or study areas of Independents in New York State.

¹⁶ *Nextel's Supplement* at p. 9, fn. 14.

Accordingly, Nextel appears to be claiming that it provides (or will provide upon designation) service in all of its Designated Areas, but does not now and, according to its construction budget, will not be able to provide service in each of these areas upon designation or within a reasonable time period thereafter. As a result of this disconnect between what Nextel claims it offers (or will offer upon designation) and where it currently provides service (and, according to its construction budget, where it intends to provide service), NYSTA is unable to determine how Nextel will be serving all of its Designated Areas in a timely manner. Without adequately demonstrating the impact its designation will have on the federal USF, this public interest component of the *Virginia Cellular Order* has not been satisfied.

Furthermore, the Supplement is silent on the *Virginia Cellular Order* requirement to serve the entire area of a rural telephone company's territory and to commit to provide Universal Service throughout its entire licensed area to avoid cream skinning. While empty claims of serving the entire Designated Areas within a reasonable period of time were made by Nextel in its Supplement, this important factor¹⁷ was ignored by Nextel.

Next, in its Supplement, Nextel has agreed to adopt the Cellular Telephone and Internet Industry Association ("CTIA") Consumer Code for Wireless Services and to annually report on the number of consumer complaints per 1,000 handsets, as Virginia Cellular agreed to in its petition. As the FCC recognized in its *Virginia Cellular Order*,

¹⁷ *Virginia Cellular Order*, at p. 16.

the CTIA Consumer Code for Wireless Services “sets out certain principles, disclosures, and practices for the provision of wireless service.”¹⁸

This Code pales in comparison to the requirements placed on landline local exchange carrier ETCs on both the federal and state levels. Specifically, in New York State, every existing ETC is a landline LEC subject to specific mandates entitled “The Telephone Fair Practices Act,” which includes rules governing applications for service, service suspension and termination, deferred payment arrangements, service deposits, bill content, and complaint handling procedures.¹⁹ Numerous other requirements are placed on landline LECs/ETCs in New York State as well -- such as service ordering, reporting on customer trouble reports per 100 access lines, directories, installation performance, and answer time performance²⁰ -- which do not apply to wireless providers because they have been specifically exempted from the jurisdiction of the Public Service Commission.²¹ Therefore, should Nextel actually provide service in any of the rural study areas identified in its Supplement, it will be subject to a significantly lighter regulatory load than the incumbent LEC. Of course, based on its existing service territories and construction budget, it does not appear likely that these services will be made available in any respect in many of the rural study areas. Accordingly, while the proposed construction budget may increase the quality of service in the already served

¹⁸ *Id.*, at p. 14.

¹⁹ 16 NYCRR § 609.

²⁰ *See*: 16 NYCRR §§ 602 and 603.

²¹ N.Y. Pub. Serv. Law § 5(3).

areas, ETC designation will do nothing in the rural study areas included in Nextel's Designated Areas which are not currently served.

Thus, should Nextel's Petition and Supplement be granted, an unlevel regulatory playing field will have been created whereby a certain ETC (namely Nextel) will be able to receive all of the benefits which accompany the grant of ETC status with only a fraction of the burdens placed on every other ETC. This is an inherently unfair situation which requires redress.

CONCLUSION

According to its Supplement, Nextel claims to have modified its original Petition to comply with the FCC's *Virginia Cellular Order*. In this regard, Nextel has failed.

It will not be providing new, competitive services to customers which lack landline service, as Virginia Cellular demonstrated. It will be spending some \$4.2 million to enhance its network, but other than in one rural study areas out of 38 across the state (and two rural exchanges in two large study areas, one of which was not included in Nextel's Designated Areas), this money will be used almost exclusively to fill service gaps in populated areas already served and expanding coverage along primary and secondary roads -- not providing service throughout its Designated Areas which includes the state's rural Independent telephone company territories. It has not made commitments to customer service quality that approach the level of service demanded of every other ETC in the state. Finally, it will not be providing a "mobility benefit" under

the *Virginia Cellular Order* because it lacks service, and, according to its Supplement, will continue to lack service in all rural study areas in its Designated Areas.

Accordingly, NYSTA respectfully requests that the Commission deny Nextel's request for ETC designation in New York State in its entirety for the reasons cited above because Nextel's Supplement failed to cure the infirmities of its original Petition. At a minimum, the request must be denied in the rural areas of the state because its Petition and Supplement are deficient and not in the public interest.

Respectfully submitted,

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Dated: May 7, 2004

Attachment I -- Member Companies Concurring in this Filing

Armstrong Telephone Company
Berkshire Telephone Corporation
Cassadaga Telephone Corporation
Champlain Telephone Company
Chautauqua & Erie Telephone Corporation
Chazy & Westport Telephone Corporation
Citizens Communications
Citizens Telephone Company of Hammond, NY
Crown Point Telephone Corporation
Delhi Telephone Company
Dunkirk & Fredonia Telephone Company
Empire Telephone Corporation
Fishers Island Telephone Company
Frontier Communications of AuSable Valley
Frontier Communications of New York
Frontier Communications of Seneca-Gorham
Frontier Communications of Sylvan Lake
Frontier Telephone of Rochester
Germantown Telephone Company, Inc.
Hancock Telephone Company
Margaretville Telephone Company, Inc.
Middleburgh Telephone Company
Newport Telephone Company, Inc.
Nicholville Telephone Company
Ogden Telephone Co. (Citizens)
Oneida County Rural Telephone Company
Ontario Telephone Company, Inc.
Pattersonville Telephone Company
State Telephone Company
Taconic Telephone Corporation
TDS Telecom -- Deposit Telephone
TDS Telecom -- Edwards Telephone
TDS Telecom -- Oriskany Falls Telephone
TDS Telecom -- Port Byron Telephone
TDS Telecom -- Township Telephone
TDS Telecom -- Vernon Telephone
Trumansburg Telephone Company
Verizon-New York
Warwick Valley Telephone Company